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TRANSCRIPT OF RECORD.

136-578

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1158. ~~764~~ ~~458~~ 187

JOHN IRWIN, PLAINTIFF IN ERROR,

vs.

THE SAN FRANCISCO SAVINGS UNION, THE BANK OF CALIFORNIA, AND GEORGE A. NOURSE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 15, 1886.

See Wright v Asbury
121 U.S. 488

1

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1 In the superior court of Solano County, State of California.

THE SAN FRANCISCO SAVINGS UNION, THE Bank of California, and George A. Nourse, plaintiffs,

vs.

JOHN IRWIN, DEFENDANT.

Complaint.

The plaintiffs in the above-entitled action in their complaint say:

I.

That the plaintiff the San Francisco Savings Union is, and at and during all the times hereinafter mentioned was, a corporation duly incorporated under the laws of the State of California.

II.

That the plaintiff the Bank of California is, and at and during all the times hereinafter mentioned was, a corporation duly incorporated
2 under the laws of the State of California.

III.

That the plaintiff herein, the said San Francisco Savings Union, the said Bank of California, and George A. Nourse, are the owners and seized in fee as tenants in common of the following-described tract of land, to wit: Beginning at a stake in the west bank of Napa Bay, 72 chains due west from the northeast corner of section thirty-four (34), in township 4 north, range 4 west, M. D. M., according to the U. S. Government survey; thence running due west 328 chains to a stake in the south bank of Huichica Creek; thence along said bank, as follows: North 83¾° west, 35 chains; north 75° W., 42 $\frac{50}{100}$ chains; south 80¼° west, 39 chains; south 60° west, 17.50 chains; south 55° west, 11 $\frac{50}{100}$ chains; south 22° west, 13.50 chains, to the county line between the counties of Solano and Napa; south 4° west, 10 $\frac{70}{100}$ chains, to San Pablo Bay; thence along the shore line of said bay south 44¾° east, 15.10 chains; south
3 67° east, 38.10 chains; south 75° east, 42.80 chains; south 61° east, 76.30 chains; south 63¾° east, 42.80 chains; south 69° 10′ east, 61 chains; south 67° 40′ east, 63.87 chains; south 68¼° east, 57.20 chains; south 65° 21′ east; 45.20 chains; south 66¼° east, 68 chains; south 80° east, 40.50 chains, to the west line of swamp and overflowed land survey No. 34 of Solano County, in the State of California; thence north along said line 22.33 chains to its northwest corner; thence east along the north line of said survey 30 chains to the shore of Napa Bay; thence along said shore north 12¾° west, 20.30 chains, to the mouth of "Dutchman's Slough," commonly so called; thence north 2¼° west, 85 chains, to South Slough, commonly so called; thence north 34¼° west, 12 chains; thence north 75° west, 17 chains; north 25° west, 43 chains; north 12½° west, 63.50 chains, to the place of beginning, all said lines

being run by the true meridian; magnetic variation, 16° 25′ east;
4 and said land being the same embraced in swamp and overflowed land survey No. 569 of said Solano County, and described in a patent issued by the State of California to John W. Pearson, as patentee, bearing date April 7, 1874, and recorded at pages 301 and following of liber 3 of patents in the office of the county recorder of the county of Solano, State of California.

IV.

That a portion of said land is situated in Solano County and the remaining portion thereof in Napa County, both in the State of California.

V.

That the defendant, John Irwin, is in possession of said land, and excludes these plaintiffs thereof. Therefore, these plaintiffs pray judgment against said defendant for recovery of the possession of said land, and for the costs of this action.

GEO. A. NOURSE,

5 *In Propria Persona and Attorney for the Defendants, the San Francisco Savings Union and the Bank of California.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Lovell White, being duly sworn, says that he is the secretary of the San Francisco Savings Union, one of the plaintiffs in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

LOVELL WHITE.

Subscribed and sworn to before me this twelfth day of September, 1883.
[SEAL.] ANDREW J. COFFEE,
Notary Public.

(Indorsed:) Superior court, county of Solano. The San Fran-
6 cisco Savings Union et al., plaintiffs, vs. John Irwin, defendant. Complaint. Filed Sept. 13th, 1883. W. J. Costigan, cl'k. George A. Nourse, attorney for plaintiffs.

7 In the superior court of the county of Solano, State of California

Summons.

THE SAN FRANCISCO SAVINGS UNION, THE Bank of California, and George A. Nourse, plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.

Action brought in the superior court of the county of Solano, State of California, and the complaint filed in the office of the clerk of said county. Geo. A. Nourse, in pro. per., and att'y for defts., the San Francisco Savings Union and the Bank of California.

The people of the State of California send greeting to John Irwin, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiffs in the superior court of the county of Solano, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served elsewhere, within thirty days.

The said action is brought to obtain judgment against you for the recovery of the possession of certain land described in the complaint
8 in this action (a copy of which complaint accompanies the summons and made part hereof) and for the costs of this action.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiffs will apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of the superior court of the county of Solano, State of California, this 13th day of Sept., in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] W. J. COSTIGAN, *Clerk.*

OFFICE OF THE SHERIFF OF THE COUNTY OF SOLANO.

I hereby certify that I received the within summons on the 13th day of Sept., 1883, and personally served the same on the 15th day of Sept., 1883, on John Irwin, he being the defendant named in said summons, by delivering to John Irwin, said defendant, personally, in the county of Solano, a copy of said summons and a true and correct copy of the com-
9 plaint in the action named in said summons, attached to said copy of summons.

Dated this 17th day of Sept., 1883.

A. KIRBY, *Sheriff.*

(Endorsed:) 418. Superior court, county of Solano. The San Francisco Savings Union et al., plaintiffs, vs. John Irwin, defendant. Summons. Filed Sept. 17, 1883. W. J. Costigan, clerk. Geo. A. Nourse, in pro. per., and att'y for the San Francisco Savings Union and the Bank of California.

10 In the superior court, county of Solano, State of California.

Stipulation that def't may have to & including Oct. 10, 1883, *to plead, &c.*

THE SAN FRANCISCO SAVINGS UNION ET AL., pl'ffs, *vs.* JOHN IRWIN, DEF,T. } No. 418.

It is hereby stipulated and agreed that defendant may have until and

including October 10th, 1883, in which to plead to plaintiffs' complaint herein.

Dated Sept. 21, 1883.

GEO. A. NOURSE,
Att'y for Pl'ff.
GEO. A. NOURSE,
In Pro. Per.

(Indorsed:) No. 418. Superior court, Solano County. The San Francisco Savings Union et al., plff's, vs. John Irwin, def't. "Stipulation." S. G. Hilborn, att'y for def't Filed Sept. 22, 1883. W. J. Costigan, clerk.

11 In the Superior court of the county of Solano, State of California.

Clerk's certificate.

THE SAN FRANCISCO SAVINGS UNION, THE Bank of California, and George A. Nourse, plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.
} No. 418.

On motion of S. G. Hilborn, esq., attorney for defendant, it is ordered that said defendant be allowed until the 20th day of October, 1883, to answer the complaint filed herein.

Entered October 6th, 1883.

OFFICE OF THE COUNTY CLERK
OF THE COUNTY OF SOLANO,
State of California, ss:

I, W. J. Costigan, county clerk of the county of Solano, and ex-officio clerk of the superior court in and for said county, do hereby cer-
12 tify the within and foregoing to be a full, true, and perfect copy of an order made and entered on the minutes of the said court.

Witness my hand and the seal of said court this 6th day of Oct., A. D. 1883.

[SEAL.] W. J. COSTIGAN,
Clerk.

13 In the superior court, county of Solano, State of California.

Petition for removal of cause to U. S. circuit court.

THE SAN FRANCISCO SAVINGS UNION ET AL., pl'ffs,
vs.
JOHN IRWIN, DEF'T.
} No. 418.

Petition of John Irwin, defendant, for removal of cause to United States circuit court.

The petition of John Irwin, the above-named defendant, shows to the court as follows:

The above-entitled action was brought in the superior court of the county of Solano, State of California, against your petitioner, John Irwin,

by the filing of a complaint and the issuance and service of a summons and copy of the complaint therein, upon your petitioner on the 13th day of September, A. D. 1883;

That your petitioner has not yet filed his answer in said cause,
14 but that as to your petitioner said cause is now pending;

That said cause has not been tried, and that this is the first term of said superior court, at which said cause could by any probability be tried;

That said action is an action at law of a civil nature, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and arises under the laws of the United States and under the treaties made under their authority.

The action is an action of ejectment brought by the plaintiff to recover from defendant possession of certain lands in Solano County, State of California, known as a portion of Mare Island, and for the value of the use and occupation thereof, and damages for its detention.

The Government of the United States, among other sources of title, claims the title to said lands by purchase in the year 1853, and has
15 been in the exclusive occupancy and possession ever since said purchase, using the same as a Government navy-yard and naval station;

That during the period the Government has occupied said premises, it has placed thereon extensive and valuable improvements consisting of docks, workshops, storehouses, hospital, a light-house, and other establishments suitable for a naval station, and that the United States has expended, in constructing said improvements on said lands, several million of dollars;

That the defendant, John Irwin, is an officer in the United States Navy, duly appointed and designated by the Secretary of the Navy as commandant of said Mare Island navy-yard, and as such and not otherwise he is and was at the commencement of this action in possession of said described premises, for the United States and not for himself, and that he never had or claimed to have any interest therein as owner, tenant, or
16 otherwise, and that from 1853 down to the present time the said United States has continuously been, and still is, the owner in fee, and in the sole and exclusive possession of said described premises and every part thereof; that the property sued for in this action and described in the complaint herein was granted by the Mexican Government to Victor Castro;

That W. H. Aspinwall and G. W. P. Bissell, by certain mesne conveyances acquired the title of said Castro to said land, and while so the owner presented their said claim to the board of land commissioners appointed to adjudicate the private land claims in California under the act of Congress of March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and such proceedings were had before said board of commissioners that their said title was confirmed on the 8th day of May, 1855;

17 That afterwards the said title of said Bissell and Aspinwall was confirmed by the honorable district court of the United States for the northern district of California by decree filed March 2d, 1857;

That on the 4th day of January, 1853, the said Aspinwall and Bissell, for a valuable consideration, viz, $80,000.00, sold and conveyed said land to

the United States and executed a proper deed of conveyance for the same, duly acknowledged, and the grantee went into possession of said lands under said deed, and has so continued to occupy the same ever since;

That on the 11th day of February, 1853, Millard Fillmore, President of the United States, by virtue of the authority in him vested by the Constitution and laws of the United States, issued his proclamation in due form reserving the lands in controversy for the sole use of the United States and declaring the same to be a reservation for Government purposes and uses.

18 Your petitioner claims that this action arises under the laws of the United States and the treaties made under their authority, and states the following questions which among others will necessarily arise and require adjudication in the trial of the action:

First. The petitioner will claim from the facts in the case that the confirmation of the grant or the petition of Bissell and Aspinwall gave to the said petitioners a perfect title to said lands without any further proceedings, and that the United States acquired and now holds said title.

Second. That neither the plaintiffs nor their grantors have ever presented their pretended claim to said land in controversy to the commissioners within the time limited by the act of Congress entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3d, 1851, and the various acts amendatory thereof, and that by the terms of said act and said amendatory acts, their claim

19 thereto, if any they ever had, lapsed, and that by their failure to present said claim they must be deemed to have abandoned the same.

Third. The question will also arise, and must be determined by the court trying said action, what are the rights of the confirmees under a grant from the Mexican Government as against a "third person," and especially against persons who have failed to present their claim to the commissioners for confirmation.

Fourth. The question will also arise, and must be determined by the court in the trial of this action, who are to be deemed and regarded as third persons under the act of March 3d, 1851, above quoted, and whether the plaintiffs are to be regarded as such "third persons."

Fifth. The question will arise, and must be determined by the court, how far and to what extent the statutes of limitation may be set

20 up in behalf of the United States holding title to lands derived from the confirmees of a grant, as against persons claiming who have failed and neglected to present claim to the land commissioners for confirmation.

Sixth. The question will arise, and must be determined by the court in trial of this cause, as to what was the effects of the proclamation of the President of the United States reserving the lands in question from sale, and declaring the same to be a reservation for Government use.

Seventh. That the property in controversy in this suit has been for more than thirty years and now is held, occupied, and possessed by the United States through its officers and agents charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof as public property of the United States for public uses in the exercise of their sovereign and con-

21 stitutional powers, as a navy-yard and naval station for the construction and repair of vessels of the Navy of the United States, and there is also established and maintained thereon a light-house and also naval hospital for sick and disabled officers and seamen of the Navy.

Wherefore the petitioner will claim and insist that the courts have no jurisdiction of the subject of this controversy, and will move that the complaint herein be set aside and all the proceedings be stayed and said action dismissed.

And the said defendant, John Irwin, hereby offers John A. McInnis, of the city of Vallejo, State of California, and James McCudden, of the city of Vallejo, State of California, as sureties for his entering in the circuit court of the United States, ninth circuit, in and for the district of California, wherein said suit is pending, on the first day of the next session of said court, or before, a copy of the record in said suit, and for paying
22 all costs that may be awarded by said circuit court, if said court should hold that said suit was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in such suit if special bail was originally required therein, and for his complying in all respects with the provisions in the premises of the act of Congress of the United States passed March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of cause from State court," and for other purposes.

Wherefore said defendant, John Irwin, prays this honorable court that said case be removed into the circuit court of the United States, ninth circuit, district of California, and that this court proceed no further in the premises.

JOHN IRWIN.

S. G. HILBORN,
Attorney for Defendant, John Irwin.

23 STATE OF CALIFORNIA,
County of Solano, ss:

John Irwin, being duly sworn, deposes and says that he is the above-named petitioner in the above-entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN IRWIN.

Subscribed and sworn to before me this third day of October, 1883.
[SEAL.] JOHN BROWNLIE,
Notary Public.

(Indorsed:) No. 418. Superior court, Solano County. The San Francisco Savings Union, et al., plaintiffs, vs. John Irwin, defendant. "Petition for removal of cause to U. S. circuit court, district of California." Filed Oct. 6, 1883. W. J. Costigan, clerk. S. G. Hilborn, attorney for defendant.

24 In the superior court of the county of Solano, State of California.

Bond on removal.

THE SAN FRANCISCO SAVINGS UNION ET AL., plaintiff,
vs.
JOHN IRWIN, DEFENDANT.

Know all men by these presents that I, John Irwin, a citizen and resident of the State of California, as principal, and John A. McInnis and James McCudden, of the city of Vallejo, State of California, as sureties, are jointly and severally held and firmly bound unto the San Francisco Savings Union (a corporation), the Bank of California (a corporation), and George A. Nourse, in the sum of five hundred dollars, for which, well and truly to be paid unto the said San Francisco Savings Union (a corporation), Bank of California (a corporation), and George A. Nourse,
25 their heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals and dated this third day of October, 1883.

The condition of this obligation is such that if the said John Irwin, the defendant in a suit now pending in this court, shall enter into the circuit court of the United States for the ninth circuit, district of California, on the first day of the next session thereof, a copy of the record in said suit, and shall pay all costs that may be awarded by said circuit court, if the said court shall hold that said suit was wrongfully and improperly removed thereto, and shall also then appear and enter special bail in said suit, if special bail be required therein, and shall enter appearance of said John Irwin in said court, then this obligation to be void; and otherwise, to remain in full force and effect.

26 In witness whereof the said obligors have hereunto set their hands and seals this third day of October, A. D. 1883.

JOHN IRWIN. [L. S.]
J. A. McINNIS. [L. S.]
JAMES McCUDDEN. [L. S.]

STATE OF CALIFORNIA,
County of Solano, ss:

John A. McInnis and James McCudden, of said county, the sureties named in the foregoing undertaking, being severally duly sworn, do each for himself depose and say that he is a resident of the State of California and a property holder therein, and is worth the sum of five hundred dollars over and above his just debts and liabilities and exclusive of property by law exempt from execution, and that he has property in the State of California liable to execution of the value of more than five hundred dollars.

J. A. McINNIS.
JAMES McCUDDEN.

27 Subscribed and sworn to before me this third day of October, A. D. 1883.

[SEAL.] JOHN BROWNLIE,
Notary Public.

(Indorsed:) The within bond is hereby approved this 6th day of October, 1883. Jno. M. Gregory, judge of the superior court, Solano Co., Cal. No. 418. Superior court, Solano County. The San Francisco Savings Union et al., plaintiffs, vs. John Irwin, defendant. Bond on transfer of case to U. S. circuit court. Filed Oct. 6th, 1883. W. J. Costigan, cl'k. S. G. Hilborn, United States attorney, attorney for defendant.

28 In the superior court of the State of California, in and for the county of Solano.

Order approving security and removing cause to U. S. circuit c't.

THE SAN FRANCISCO SAVINGS UNION, THE Bank of California, and George A. Nourse, plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant, John Irwin, under the provisions of an act of Congress of the United States passed March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and on motion of S. G. Hilborn, esq., of counsel for defendant, it
29 is ordered that the security offered by the said defendant be approved, and that this court proceed no further in this cause, and that the same be removed into the circuit court of the United States for the ninth circuit, State of California.

Dated this 6th day of October, A. D. 1883.

JNO. M. GREGORY,
Judge.

(Indorsed:) No. 418. Superior court, county of Solano. The San Francisco Savings Union et al., plaintiffs, vs. John Irwin, defendant. "Order of removal of cause to U. S. circuit c't." Filed and entered Oct. 6th, 1883. H. J. Costigan, cl'k. S. G. Hilborn, attorney for defendant.

30 *Clerk's certificate.*

STATE OF CALIFORNIA,
County of Solano, ss:

I, W. J. Costigan, county clerk of the county of Solano, State of California, and ex-officio clerk of the superior court of said county, do hereby certify the foregoing to be a full, true, and correct copy of the whole of the record in the within-entitled action of "The San Francisco Savings Union et al., vs. John Irwin," now on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the said superior court this 8th day of October, 1883.

[SEAL.] W. J. COSTIGAN,
Clerk.

(Endorsed:) U. S. circuit court, Cal. Transferred record. Filed October 9, 1883. L. S. B. Sawyer, clerk.

31 In the circuit court of the United States, in and for the ninth circuit, State of California.

Answer.

THE SAN FRANCISCO SAVINGS UNION, THE Bank of California, and George A. Nourse, plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.

The answer of John Irwin, the defendant, to the complaint of the San Francisco Savings Union, the Bank of California, and George A. Nourse.

The defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many uncertainties and imperfections in the said complaint contained, for answer thereunto saith:

He denies that the plaintiffs or either of them are now or ever
32 have been the owners, or seized in fee or otherwise, as tenants in common or otherwise, of the tract of land described in said complaint or of any part or portion thereof.

And the defendant, further answering, says that the premises and property mentioned and described in said complaint has been for more than thirty years last past and now is held, occupied, and possessed by the United States through its officers and agents, charged in behalf of the Government of the United States with the control of said property, and who are in the actual possession thereof as public property of the United States, for public uses in the exercise of their sovereign and constitutional power, and that said land and property is a part of Mare Island, and that on said Mare Island there is, and for more than thirty years last past has been, a navy-yard and naval station for the construction and repair of vessels of the Navy of the United States, and there is
33 also established and maintained thereon a light-house and also a naval hospital for sick and disabled officers and seamen of the Navy of the United States. The said property is known as and called Mare Island navy-yard.

And the defendant, further answering, says that he is an officer in the United States Navy, duly appointed and commissioned, and prior to the commencement of this action was designated by the Secretary of the Navy as commandant of said Mare Island navy-yard.

And as such commandant, and not otherwise, he was at the commencement of this suit and still is in possession of said described premises and property of the United States and not for himself, and that he never had or claimed to have any interest in or to said property, or any part thereof, as owner, tenant, or otherwise, and that from A. D. 1853 down to

34 the present time the United States has continuously been and still is the owner in fee and in the sole and exclusive possession of said premises described in plaintiffs' complaint, and of every part thereof.

And, further answering, the defendant says the United States, by and through its officers and agents, has been in the adverse, exclusive, continued, and uninterrupted possession and actual occupation of said land and premises under claim of title, exclusive of other right, for more than five years immediately preceding the commencement of this action.

And, further answering, the defendant says that the premises and property sued for in this action, and described in plaintiffs' complaint herein, was granted by the Mexican Government to Victor Castro; that W. H. Aspinwall and G. W. P. Bissell, by certain mesne conveyances, acquired the title of said Victor Castro to said land, premises, and property, and while so the owners presented their said claim to the board of
35 land commissioners appointed to adjudicate the private land claims in California, under the act of Congress of March 3d, A. D 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and such proceedings were had before said board of commissioners that their said title was confirmed on the 8th day of May, A. D. 1855.

That afterwards the said title of the said Aspinwall and Bissell was confirmed by the honorable district court of the United States for the northern district of California by decree filed March 2d, A. D. 1857.

That, on the 4th day of January, A. D. 1853, the said Aspinwall and Bissell, for a valuable consideration, viz, eighty thousand dollars, sold and conveyed said lands to the United States and executed a proper deed of conveyance for the same, duly acknowledged, and the United States, as such grantee, then went into possession of said lands and premises
36 under said deed, and has so continued to occupy the same and every part thereof ever since said 4th day of January, A. D. 1853.

That the land and premises described in the plantiffs' complaint herein is a part and portion of the said land and premises purchased by the United States from the said Aspinwall and Bissell as aforesaid.

That, on the 11th day of February, A. D. 1853, Millard Filmore, President of the United States, by virture of the authority in him vested by the Constitution and laws of the United States, issued a proclamation in due form reserving the lands in controversy, together with other lands adjacent thereto, for the sole use of the United States, and declaring the same to be a reservation for Government purposes and uses.

And, further answering, the defendant says that the State of California never did possess the legal title to the land and premises described in the said plaintiffs' complaint herein, nor to any part or portion thereof.

37 That the State of California never did have legal right or authority to sell or convey said land or any part or portion thereof, to John W. Pearson, the alleged patentee thereof, or to any other person or persons whomsoever.

That the pretended patent described and referred to in plaintiffs' complaint, if the same was ever issued to said John W. Pearson by the State of California, was illegally issued, and the same is invalid and of no effect in law.

That the State of California never had legal right to execute or issue a patent for said land or any part thereof.

And further answering, the defendant says that the court here ought not to take cognizance of or sustain this action, because, he says, that it does not appear, nor is it a fact, that the plaintiffs, or either of them, or their ancestors or predecessors or grantees, were seized or possessed of the premises or property described in the complaint, or any part thereof,
38 within five years before the commencement of this action.

And the defendant, further answering, says that the court here ought not to take cognizance of or sustain this action, because, he says, the said cause of action, if any there be, is barred by the provisions of sections 318 and 319 of the Code of Civil Procedure of the State of California.

And the said defendant, further answering, denies that said plaintiffs are, or that either of them is, entitled to the relief, or any part thereof, in said complaint demanded.

And the defendant prays the same advantage of his aforesaid answer as if he had pleaded or demurred to the said complaint.

And the defendant further prays that the plaintiffs take nothing by their suit, and that he may be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

S. G. HILBORN,
Attorney for Defendant.

39 STATE OF CALIFORNIA,
County of Solano, ss:

John Irwin, being duly sworn, says that he is the defendent in the above entitled action; that he has heard read the foregoing answers and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

JOHN IRWIN.

Subscribed and sworn to before me this 26th day of October, A. D. 1883.
[SEAL.] JOHN BROWNLIE,
Notary Public.

(Endorsed:) Due service of within answer and receipt of a copy thereof is admitted this 29th day of October, 1883.

GEO. A. NOURSE,
In Pro. Per., and as Att'y for Pl'ffs, Bank of Cala. and S. F. Savings Union.

Filed Oct. 29th, 1883.

L. S. B. SAWYER, *Clerk.*

40 In the circuit court of the United States, ninth circuit, district of California.

Stipulation waiving jury, &c.

THE SAN FRANCISCO SAVINGS UNION ET AL., plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.

It is hereby stipulated between the respective parties to the above suit that the jury be waived, and that the same shall be tried by the court without a jury.

That the suit shall be passed from day to day until such time as the same can be heard by the court.

S. G. HILBORN,
U. S. Att'y, Attorney for Def't.
GEO. A. NOURSE,
Att'y for Pl'ffs.

(Endorsed:) Filed December 15, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

41 In the circuit court of the United States, ninth circuit, district of California.

Amendment to answer.

SAN FRANCISCO SAVINGS UNION ET AL., plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.

Comes now said defendant, John Irwin, and leave having been first granted by said court, and amends his answer now on file in said cause by inserting therein after the word "California," in line 13 of page 6, the following:

Further answering, said defendant says that the cause of action stated in said plaintiffs' complaint, for the recovery of the possession of said premises therein described, or any part thereof, is barred by the provisions of section three hundred and eighteen (318), of the Code of Civil Pro-
42 cedure of said State.

S. G. HILBORN,
U. S. Dist. Att'y, & Att'y for Defendants.
A. L. RHODES,
Special Ass't Att'y for the U. S., & Att'y for Def'ts.

STATE OF CALIFORNIA,
City & County of San Francisco, ss:

John Irwin being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing amendment to the answer in said cause and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN IRWIN.

Subscribed & sworn to before me this 9th day of January, 1885.
L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. of Cal.

43 STATE OF CALIFORNIA,
City & County of San Francisco, ss:

William P. Lawler, being duly sworn, deposes and says that he is a citizen of the United States, over the age of twenty-five years; that he served the within and foregoing amendment on George A. Nourse, the attorney

for the plaintiff in the within-entitled cause, by depositing a copy thereof in the United States post-office in this city with the postage thereon prepaid, addressed to the said Nourse at his place of residence, to wit, Merced, in said State of California.

And further saith not.

W. P. LAWLER.

Subscribed & sworn to before me this 21st day of January, 1885.

L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. Cal.

(Endorsed:) Filed Jan'y 21, 1885. L. S. B. Sawyer, clerk.

44 U. S. circuit court, ninth circuit, district of California.

Findings.

THE SAN FRANCISCO SAVINGS UNION, THE Bank of California, and George A. Nourse, plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.

The issues of fact in this action having been tried by the court without the intervention of a jury, the attorneys of record of the parties having filed a stipulation in writing with the clerk waiving a jury, and the testimony produced by the respective parties having been heard and considered with the argument of counsel thereon, and due deliberation having been had, the court finds for the plaintiffs on all the issues of fact in the action and against the defendant. And as a conclusion of law therefrom
45 the court finds that the plaintiffs are entitled to the possession of the lands in controversy as described in the complaint. Judgment that the plaintiffs recover such possession will accordingly be entered.

May 31, 1886.

FIELD, *Circuit Justice.*
SAWYER, *Circuit Judge.*

(Entered:) Filed July 8, 1886. L. S. B. Sawyer, clerk.

46 In the circuit court of the United States, ninth circuit, district of California.

Judgment.

SAN FRANCISCO SAVINGS UNION ET AL., plaintiffs,
vs.
JOHN IRWIN, DEFENDANT.
No. 3140.

This cause having come on regularly for retrial on the 16th day of July, 1885, being a day in the July term, 1885, of said court, before the court sitting without a jury, a trial by jury having been waived by stipulation of counsel, in writing, for the respective parties hereto, duly filed with the clerk of said court, Geo. A. Nourse and S. O. Houghton, esqs., appearing on behalf of the plaintiffs, and S. G. Hilborn, esq., United States attorney, Carroll Cook, esq., assistant United States attorney, and A. L. Rhodes,

esq., on behalf of the defendant, and the trial having been pro-
47 ceeded with on the 16th and 17th days of said July, in said year and term, and the evidence, oral and documentary, on behalf of the respective parties, having been introduced and closed, the cause, after arguments of counsel, was submitted to the court for consideration and decision, and the court, after due deliberation, having filed its finding in writing and ordered that judgment be entered herein in accordance therewith, with costs;

Now, therefore, by virtue of the law and by reason of the finding aforesaid, it is considered by the court that the San Francisco Savings Union, the Bank of California, and George A. Nourse, plaintiffs, do have and recover of and from John Irwin, defendant, the possession of that certain tract or parcel of land situate in the counties of Solano and Napa, State of California, and described as follows, to wit: Beginning at a stake in the west bank of the Napa Bay, 72 chains due west from the northeast
48 corner of section thirty-four (34), in township 4 north, range 4 west, M. D. M., according to the U. S. Government survey; thence running due west 328 chains to a stake in the south bank of Huichica Creek; thence along said bank as follows: north 83¾° west, 35 chains; north 75° W., 42 50/100 chains; south 80¼° west, 39 chains; south 60° west, 17.50 chains; south 55° west, 11.50 chains; south 22° west, 13.50 chains, to the county line between the counties of Solano and Napa; south 4° west, 10.70 chains, to San Pablo Bay; thence along the shore line of said bay south 44¾° east, 15.10 chains; south 67° east, 38.10 chains; south 75° east, 42.80 chains; south 61° east, 76.30 chains; south 63¾° east, 42.80 chains; south 69° 10′ east, 61 chains; south 67° 40′ east, 63.87 chains; south 68¼° east, 57.20 chains; south 65° 21′ east, 45.20 chains; south 66¼° east, 68 chains; south 80° east, 40.50 chains, to the west line of swamp and overflowed land, survey No. 34 of Solano County, in the State of California; thence north along said line 22.33 chains to its northwest corner;
49 thence east along the north line of said survey 30 chains, to the shore of Napa Bay; thence along said shore north 12¾° west, 20.30 chains, to the mouth of "Dutchman's Slough," commonly so called; thence north 2¼° west, 85 chains, to South Slough, commonly so called; thence north 34¼° west, 12 chains; thence north 75° west, 17 chains; north 25° west, 43 chains; north 12½° west, 63.50 chains, to the place of beginning, all said lines being run by the true meridian, magnetic variation 16° 25′ east, and said land being the same embraced in swamp and overflowed land survey No. 569, of said Solano County, and described in a patent issued by the State of California to John W. Pearson, as patentee, bearing date April 7, 1854, and recorded at pages 301 and following of liber 3 of patents, in the office of the county recorder of the county of Solano, State of California, together with their costs in this behalf expended, taxed at $309.70.

Judgment entered this 8th day of July, 1886.

L. S. B. SAWYER,
Clerk.

A true copy. Attest, &c.:
[SEAL.]

L. S. B. SAWYER,
Clerk.

50 (Endorsed:) Filed July 8, 1886. L. S. B. Sawyer, clerk.

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, district of California.

Clerk's certificate.

SAN FRANCISCO SAVINGS UNION ET AL.
vs.
JOHN IRWIN. } No. 3140.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers, hereto annexed, constitute the judgment roll in the therein entitled action.

51 Witness my hand and the seal of said circuit court, this 8th day of July, A. D. 1886.

[SEAL.] L. S. B. SAWYER,
Clerk,
By F. D. MONCKTON,
Deputy Clerk.

(Endorsed:) Judgment roll. Filed July 8th, 1886. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

52 United States circuit court, ninth circuit, district of California.

Opinion.

THE SAN FRANCISCO SAVINGS UNION, THE Bank of California, and George A. Nourse, plaintiffs,
vs.
JOHN IRWIN, DEFENDANT. } July, 1886.

Before Field, circuit justice, and Sawyer, circuit judge.

By the court, FIELD, circuit justice:

This is an action to recover possession of a tract of land, situated partly in the county of Napa, and partly in the county of Solano, consisting of 7,413 acres and a fraction of an acre. It is alleged to be swamp and overflowed land, and that the title to it therefore passed to the State by

53 the act of Congress of September 20, 1850, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." (9 Stats., 519.)

The first section of that act grants to the State of Arkansas "the whole of those swamp and overflowed lands made unfit thereby for cultivation," which were unsold at the date of its passage. The fourth section extends the provisions of the act to and confers their benefits upon each of the other States of the Union in which swamp and overflowed lands are situate.

The act is a grant in presenti to each State then in the Union of lands situate within its limits of the quality described. Its language is that they "shall be and the same are hereby granted to said State," words which import an immediate transfer of interest, and not one in the future. The pro-

visions of the second section making it the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to make out
54 an accurate list and plat of the lands described, to transmit the same to the governor of the State, and on his request to cause a patent to be issued to the State; and declaring that "on that patent the fee-simple to the said lands shall vest in the State," subject to the disposal of the legislature thereof, did not prevent the immediate passing of the title. The patent, with the definite description by metes and bounds of the land which it would furnish, would serve a useful purpose. It would render it unnecessary for the State, or grantees from the State, to make any further proof of the character of the land should any controversies arise respecting it. In many ways, doubts might be created on the subject; the evidence might be conflicting as to whether the greater part of a legal subdivision fell within the description required as being "wet and unfit for
55 cultivation." In all such cases the patent would solve the doubt, for the determination in that respect of the Secretary of the Interior would be controlling. The ascertainment and designation of the lands as those described would be conclusive as against collateral attack. But the title of the State to the lands, they being swamp and overflowed, cannot be defeated, nor in any way impaired, by the delay or refusal of the Secretary of the Interior to have the required list made and patent issued. The State and her grantees might be embarrassed in the assertion of their rights, but no other consequence would follow.

Such is the purport of the advice given to the Secretary of the Interior by the Attorney-General of the United States in his communication of November 10, 1858. "It is not necessary," he said, "that the patent should issue before the title vests in the State under the act of 1850.
56 The act of Congress was itself a present grant wanting nothing but a definition of boundaries to make it perfect, and to attain that object the Secretary of the Interior was directed to make out an accurate list and plat of the lands, and cause a patent to be issued therefor. But when a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of his title." (Opinions of Attorneys-General, vol. 9, p. 254.) Such is also the purport of several decisions of the supreme court of California. In Owens vs. Jackson (9 Cal., 322), which was an action like the present one for the possession of swamp and overflowed lands under a patent of the State, the defendant demurred to the complaint because it did not show that the land had been surveyed and patented to the State. The demurrer was sustained in the court below, but the supreme court reversed the decision, holding
57 that the State had the right to dispose of the swamp and overflowed lands granted to her by the act of 1850, prior to a patent from the United States, so as to convey a present title to the patentee as against a trespasser. "The act of Congress," said the court, "describes the land, not by specific boundaries, but by its quality, and is a present legislative grant of all the public lands within the State of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive as between the United States and the State." (See also Summers vs. Dickinson, ibid., 554, and Kernan vs. Griffith, 27 Cal., 87.)

In Railroad Company vs. Smith (9 Wall., 95) the question was presented to the Supreme Court of the United States whether the grant by the act of Congress of June 10th, 1852, to Missouri of lands to
58 aid in the construction of certain railroads, covered the swamp and overflowed lands granted to her by the act of September 20, 1850, no patent for those lands having been issued to her after observing that there was a present grant by Congress of certain lands to the States within which they lie, but by a description requiring something more than a mere reference to townships, ranges, and sections to identify them, and that it was made the duty of the Secretary of the Interior to ascertain the character of the lands, and furnish the State with evidence of it, the court said: "The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them
59 could not be defeated by that delay." And the court further observed that, as the Secretary had no satisfactory evidence under his control to enable him to make out these lists, he must, if he attempted it, rely on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed; that "the matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was to primarily decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

In French vs. Fyan (93 U. S., 169) this subject is further considered, and the circumstances under which parole evidence to show that lands claimed as swamp and overflowed will be received, are stated with greater precision. That was an action of ejectment for swamp and over-
60 flowed lands, and the only question raised related to the refusal of the court below to receive oral testimony to impeach the validity of a patent issued by the United States to the State of Missouri for the land in question under the act of 1850, the purpose of the testimony being to show that the land in controversy was not, in point of fact, swamp land within the meaning of that act. The land had been certified in 1854 to the Missouri Pacific Railroad Company as part of the land granted to aid in the construction of its road by the act of June 10, 1852, and the plaintiff had become vested with the title of the company. To overcome this title the defendant gave in evidence the patent to the State under the swamp-land act, under which he claimed by regular conveyances. The plaintiff then offered to prove by witnesses who had known the character of the land in dispute since 1849, that it was never wet and unfit
61 for cultivation. The court below refused to receive the testimony, and the propriety of its ruling was thus brought before the Supreme Court. After observing that it had been more than once decided that the swamp-land act was a grant in presenti by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage, and that the patent therefore, which is the evidence that the lands contained in it had been identified as swamp lands, relates back and gives certainty to the title as of the date of the grant, the court said that by the second section of the act the power and duty de-

volved upon the Secretary of the Interior, as the head of the Department which administered the affairs of the public lands, of determining what lands were of the description granted, and made his office the tribunal whose decision on this subject was to be controlling, and it was
62 his duty to have accurate lists and plats of the lands described made out and transmitted to the governor of the State, upon whose request a patent was to be issued. Parole evidence to show that the land covered by the patent to the State was not swamp and overflowed land was therefore held to be inadmissible. In commenting upon the case of Railroad vs. Smith (9 Wall., 95), which was supposed to justify the offer of the parole testimony, the court said that "the admission of the testimony in that case was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selections or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act." "There was no means," it added, "as this court has decided, to compel him to act. If the party claiming under the State in that case could not be permitted to
63 prove that the land which the State had conveyed to him as swamp land was, in fact, such, a total failure of justice would occur and the entire grant of the State might be defeated by this neglect or refusal of the Secretary to perform his duty."

The result of these two cases in the Supreme Court is this: That wherever the Secretary of the Interior has acted and certified the lists required by the act of 1850 and issued the patent, his determination is so far conclusive as to the character of the land that it cannot be collaterally attacked. But, where he has failed to make such list and issue the patent, it is competent for the State, or parties claiming from her, to prove by parole testimony that the land is of the character mentioned in the act of 1850 which passed to her.

On the seventh of April, 1874, the State, through her properly
64 authorized officers, issued a patent of the tract in controversy to one George W. Pearson, describing it as swamp and overflowed land, and giving its metes and bounds. Through him by various mesne conveyances the plaintiffs trace their title, each having acquired an undivided one-third interest in the premises as tenant in common with the others. The State, by various enactments, had provided for the sale of lands of this character, and no question is made as to the conformity of the proceedings with their requirements in the issue of the patent. The objection taken to the acquisition of any title by the State until the lands had been listed and patented to her by the United States. The patent of the State is the conveyance of whatever interest she had at that time in the land, and if it were within the description of swamp and overflowed land her interest was paramount to that of the United States, unless their title ante-
65 dates the act of 1850. An attempt was made at the trial to show that it passed as an appurtenant to Mare Island under the alleged Mexican grant to Castro, of which we shall hereafter speak. Laying that aside for the present, the question is, was the tract swamp and overflowed land within the act of 1850? In the absence of any action of the Secretary of the Interior which would be conclusive in the matter as against collateral attack, the testimony of witnesses having knowledge of the subject as to the character of the land, was admissible under the decisions

mentioned. That testimony clearly showed that the land was subject to periodical overflow by the rising of the tides in the bay of San Pablo so as to make it unfit to raise ordinary crops of the country without protecting it with levees from such overflow. The act of 1850 grants swamp and overflowed lands; swamp lands, as distinguished from over-
66 flowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the flow of the tides. When drainage, reclamation, or leveeing is necessary to enable the farmer to use them for some of the ordinary purposes of husbandry, the lands are within the terms of the act of Congress and the title passed by it to the State.

The patent of the State is thus prima facie evidence that the land embraced by it is of the character represented, and the testimony on the subject is without contradiction. Indeed, we do not understand that the defendant questions its force; he denies only its relevancy and
67 competency. The main defense is founded on the theory that until the land is listed to the State and patented by the United States, no title to the State passes. For the reasons expressed this position is not tenable.

The other defences are, that the defendant holds possession of the premises as commander of the navy-yard at Mare Island for the United States, and that they have title to the premises in controversy under a grant of the island to Victor Castro by the Mexican Government and sundry mesne conveyances from him, and that the action is barred by the statute of limitations of the State.

Neither of these defences is, in our judgment, tenable. The fact that the defendant is an officer of the Navy of the United States, and is acting under their orders, gives no justification to the retention of the premises against the claim of the true owners. The Government of the
68 United States is one of law, and their officers cannot deprive any citizen of his property except as the law authorizes it, and no law can authorize it except upon just compensation to the owner. This subject has been so fully considered in the learned and exhaustive opinion of the Supreme Court, delivered by Mr. Justice Miller in the recent case of the United States against Lee, generally known as the Arlington case, that nothing could be added by us (106 U. S., 196). Its reasoning is conclusive.

The alleged grant to Victor Castro by the Mexican Government covers only Mare Island. The decree of confirmation rendered by the United States Land Commission, May 8, 1852, describes the premises thus: "The place of which confirmation is hereby given is situated in the bay of San Francisco (San Pablo) and is called the Isle de la Yegua, or
69 Mare Island, and being an island is bounded by the water's edge." An appeal was taken from the decree to the district court of the United States, but what action was there had upon it does not appear. The answer alleges that the title was confirmed by that court on the second of March, 1857, but no record of the fact, if such were the case, was produced. Assuming that it was confirmed, the title recognized was only to the island "bounded by the water's edge." Without these words, the

island could not be extended beyond the water's edge. By the common law—and by that law must decrees written in the English language be interpreted—the boundary of the island, so far as its ownership as private property is concerned, is determined by ordinary high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark over which the daily tides ebb and flow (United
70 States vs. Pacheco, 2 Wall., 589; 3 Kent, 427). If we could pass over the language of the decree, and apply the rule of the civil law, assuming that it was in force in California at the date of the grant, the extent of the land of the island susceptible of private ownership would be less than under the rule of the common law. Under neither could the private ownership of the land of the island extend to lands regularly covered each month by the flow of the tides. Such ownership was all that was conceded by the grant to Castro, and the decree affirming the claim of his grantees under it. Large portions of the land in controversy are also separated from the island by navigable sloughs.

Previously to August 31st, 1852, the title which Castro possessed had become vested by various mesne conveyances in William H. Aspinwall and George W. P. Bissell, who on that day presented a petition to the
71 Board of Land Commissioners under the act of March 3, 1851, for the settlement of private land claims in California, praying for a confirmation of their claim under that grant. The decree of May 8, 1852, from which we have quoted, confirming the claim, was made upon their petition. On the 4th of January, 1853, they sold and conveyed the island to the United States, describing it as "all that tract of land called and known as Mare Island in the bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for a navy-yard there, including all the tule or low and marsh land belonging to the same, or which has ever been reputed or claimed to belong to the same." This description is more extensive than the one given in the grant to Castro, or by the commissioners in the decree confirming the claim under it. Nothing is said in either grant or decree of tule or low or marsh land
72 belonging to the island, or which had been reputed or claimed to belong to it. These words are of the vaguest character. Whatever may have been intended by them, certain it is that the grantors, Aspinwall and Bissell, could only convey what they acquired under the grant, and the United States took, and could only take such interest, and that, as we have seen, was limited to the island bounded by the water's edge.

From the date of that conveyance the United States have been in possession of the island, and have constructed there large and expensive buildings for the uses of the Navy, including a navy-yard. They have also occasionally asserted ownership over the adjacent overflowed lands, but the acts done by them were not of a character to indicate any settled purpose of occupying the lands or devoting them to any public uses. They have
73 not constructed any levees to prevent their overflow, or made any efforts to reclaim the lands, or to subject them to any uses of the Government. Two shanties, ten by twelve, erected in 1874 or 1875, on the lands nearly eight miles distant from the island, were soon abandoned and no other buildings have been erected on them. It is plain that the acts which the United States are said to have done to mark their control of the overflowed lands, if done by a private party, would not bar the plaintiffs from asserting their right of possession. There was on their part no such pos-

session as would set the statute of limitation running and which in time might ripen into a title against the true owners. It was not open, exclusive and continuous, such as to give notice to the owners of an intention to claim title adversely to them; and the testimony indicates that the plaintiffs were ignorant of any adverse claim on the part of the
74 United States till a short time before the commencement of this suit. It was not accompanied by any of the ordinary acts indicating ownership; and at no time were any such acts done except in the instance mentioned where the two shanties were constructed but soon afterwards abandoned.

But independently of this consideration we doubt very much whether the United States can acquire title by adverse possession against the right of a private citizen. The theory that an open and uninterrupted possession of land by a party not being the real owner may ripen into title, is founded upon the supposed acquiescence of the owner in the claim of the occupant by his not entering upon the property or taking legal proceedings to recover its possession. Statutes of limitation do not run against the United States except when expressly provided by Congress, and no action
75 will lie against them by a private citizen except by their consent.

Legal proceedings to enforce the claim of a citizen to lands in possession of the United States could not therefore be taken, and no statute can run against one to whom the courts are closed for the maintenance of his claim. Nor could the citizen assert his claim to such lands by entering upon them. There can be no private entry upon land for the assertion of one's rights, where the law does not allow an action against the occupant for the possession. In the present case the United States are not sued. They cannot be sued. The defendant is not sued in his official character, but as an individual. He is alleged to be in possession. He admits that he is, and justifies that possession by alleging that he is an officer of the United States and acting under their authority. He can only make good this defence by showing that the United States
76 were lawfully authorized to put him in possession of the land, and such authority they, only possessed if they held the title, or had the assent of the owner, neither of which is shown in the present case.

We do not give any weight to the fact that in 1853, by order of the President of the United States, Mare Island was reserved with all its alleged appendages of tule or marsh lands, ordinarily reputed to belong to such island, for if such reservation was intended to include all the swamp and overflowed lands in controversy, it was to that extent inoperative, the title, as we have already seen, having passed to the State by the act of September 20, 1850.

It follows from what we have said that findings must be had upon all the issues in favor of the plaintiffs, and judgment entered therein
77 in their favor for the possession of the premises in controversy.

(Signed) FIELD,
Circuit Justice.

(Signed) SAWYER,
Circuit Judge.

(Endorsed:) Read in open court this 8th day of July, 1886.
L. S. B. SAWYER,
Clerk.

78 U. S. circuit court, dist. of California.

Appointment of A. L. Rhodes as special assistant att'y of the U. S.

SAN FRANCISCO SAVINGS UNION, PL'FF,
vs.
JOHN IRWIN, DEF'T. } No. 3140.

Upon the request of S. G. Hilbirn, district attorney for California, Augustus L. Rhodes is hereby appointed a special assistant attorney of the United States for the district of California in the above-entitled case.

August 16th, 1884.

(Signed) BENJAMIN HARRIS BREWSTER,
Attorney-General.

(Endorsed:) Filed December 20, 1884. L. S. B. Sawyer, clerk.

79 In the circuit court of the United States, ninth circuit, district of California.

Bill of exceptions.

SAN FRANCISCO SAVINGS UNION ET AL.,
plaintiffs,
vs.
JOHN IRWIN, DEFENDANT. } No. 3140.

Be it remembered that this cause came on for trial on the 25th day of March, 1885, before said court, without a jury, the said parties having waived a jury, and George A. Nourse and Sherman O. Houghton appeared as the attorneys for the plaintiffs, and Samuel G. Hilborn and Augustus L. Rhodes appeared for said defendant, and the following proceedings were had, to wit:

The said plaintiffs, to maintain the issues on their part, offered in evidence a patent bearing date April 7, 1874, issued by the State of
80 California to John W. Pearson, under whom the plaintiffs claim title to the lands in suit, which patent is in the usual form of patents issued by said State for swamp and overflowed lands, and is signed by the governor of said State, and sealed with the seal of said State; which patent describes and purports to convey to said John W. Pearson the lands described in the complaint herein, and in its form and execution is sufficient to convey from the said State to said Pearson the title to said lands had such title at the date of said patent been held by said State.

Said defendant objected to the admission in evidence of said patent, on the ground that it is incompetent and inadmissible as evidence:

That a patent issued by the State to any individual for swamp or overflowed lands does not convey title to the lands therein described, unless it be shown that the same lands have been patented by the United States to the State, or listed to the State by the Land Department of the United States.

81 That it has not been shown by competent evidence that it has been determined by the proper authorities of the Land Department

of the United States that the lands described in the patent, or any part thereof, are swamp or overflowed lands within the meaning of the act of Congress approved September 28, 1850, commonly known as the Arkansas land act.

Said court overruled said objection, and said defendant then and there excepted to the decision of the court, and said patent was thereupon read in evidence.

The said plaintiffs called as witnesses William W. Fitch, who, being sworn, stated that he was acquainted with the lands described in the complaint. The witness was then asked by the plaintiffs to state the character of the lands—as being swamp or overflowed lands, or dry lands; as being fit or unfit for cultivation without reclamation by levees and drains. The defendant objected to the question on the same grounds that he
82 objected to the patent; also on the ground that the character of the lands, as swamp or overflowed lands, could not be proven by parol evidence; that the lands could not be shown to be swamp or overflowed lands within the meaning of said Arkansas swamp land act in any other mode than by the official action and determination of the proper officers of the Land Department of the United States.

It was admitted by said plaintiffs that said lands had not been subdivided into sections or designated as swamp or overflowed lands by the surveyor-general of the United States for the State of California; that none of said lands had been listed to the said State by the Land Department of the United States, and that no patent had issued from the United States to said State for any of said lands.

The court overruled said objections, and said defendant excepted to the decision of the court. The said witness thereupon testified that all of said lands were marsh lands, and were overflowed at spring tides by the
83 waters of the bay and of Napo Creek; that they were swamp and overflowed lands; that they were made thereby wet and unfit for cultivation; that the construction of levees and drains was required, in order to render said lands fit for cultivation.

Several other witnesses for the plaintiffs testified, subject to the same objections and exceptions, to the same effect as said Fitch, and no testimony in rebuttal was offered on this point.

The plaintiffs offered in evidence the plat of a survey of the lands in suit, made by W. W. Fitch, the county surveyor of Solano County, State of California, in the year 1869. Said plat was made in the manner and form prescribed by the statutes of said State, and purported to subdivide the lands into sections, and exhibited the township lines upon and adjacent to the lands as said lines had been run by the authority of the United States. It was admitted by the plaintiffs that the lines of the
84 sections had not been run by the officers of the Land Department of the United States, but had been projected and drawn upon the plat by said county surveyor.

It was admitted by the defendant that all the proceedings for the acquisition by the said Pearson of title from the State to the lands in suit, as swamp and overflowed lands, were in conformity with the statutes of said State, except that it was not proven and the defendant did not admit that any of said lands had been segregated or designated as swamp lands or overflowed lands by any officer of the Land Department of the United

States, or had been listed to the State by that Department, or had been patented by the United States to the State. Said plat of survey was objected to by the defendant on the same grounds as were presented to said patent.

The court overruled said objections to said plat, and the defendant then and there excepted to the decision of the court, and said plat was thereupon read in evidence.

85 Casamir Bielawski, a witness for the plaintiff, testified in substance as follows:

I am, and for many years have been, draughtsman in the office of the U. S. surveyor-general for the State of California. I have in my possession here the following maps, on file in said office, and in the custody of said surveyor-general, which I have brought therefrom. They are plats or maps made in said office, under the direction of said U. S. surveyor-general of —.

Township 3 north, in range 4 west, Mt. D. B. & M., township 4 north, in range 4 west, Mt. D. B. & M. The Huichica Rancho, a Mexican grant, duly approved and surveyed.

Said maps or plats were then, on behalf of plaintiffs, offered in evidence and received without objection. They showed the upland in said townships and rancho sectionized by the U. S. Government down to the northwest, north, and northeast sides of the large tract of swamp and overflowed land on San Pablo Bay, Napa Creek, Suisun Bay, &c., of which

86 the demanded premises form a part, and said demanded premises, with other lands adjoining, were represented and delineated on said plats as swamp and overflowed land. It was admitted on the part of the plaintiffs that the said tracts of swamp and overflowed land had never been divided into sections, or segregated as swamp or overflowed land by the authority of the United States.

Said witness further testified as follows, in substance:

I have here in my possession a plat on file in the office of the U. S. surveyor-general for the State of California, and in his official custody, filed February, 1870, in said office, by the surveyor-general of the State of California. It is a segregation map made under sections 4 and 5 of the act of Congress, entitled "An act to quiet land titles in California," by the said surveyor-general of the State.

Said map was offered and received in evidence without objection on behalf of said defendant.

It showed large tracts of land in San Pablo Bay, Napa Creek,

87 Suisun Bay, and other waters of California, as swamp and overflowed lands, claimed by said State of California under said swamp land-grant act, including the demanded premises, with a large area of such land adjoining it, represented thereon as notoriously and obviously swamp and overflowed.

Said plat was filed, marked as filed in said office of said U. S. surveyor-general in February, 1870.

When the plaintiffs rested, the defendant moved the court to strike out the above-mentioned patent and the above-mentioned plat, and also to strike out and exclude all the testimony of the plaintiffs' witnesses, introduced for the purpose of showing that the lands in suit are swamp and overflowed lands, and came within the description of lands granted by the act of Congress of September 28th, 1850, known as the Arkansas swamp

land act, upon the same grounds that had been presented as objections to the admission in evidence of said patent and plat, and of the
88 testimony of said witness.

The court denied said motion, and refused to strike out any of said evidence, and said defendant then and there excepted to the decision of the court.

The said cause having been heard, the court, on the 8th of July, 1886, found the issues in the cause for the plaintiffs, and ordered judgment to be entered in their favor and against the defendant for the recovery of the possession of the lands described in the complaint, and for their costs.

We do hereby stipulate that the foregoing is a full, correct, and true bill of exceptions taken upon the trial of said action, and we do hereby request the judge of said court to allow and settle the same as the bill of exceptions in said cause.

August 16, 1886.

GEO. A. NOURSE,
Att'y for Plaintiffs.
A. L. RHODES,
Att'y for Defendant.

The foregoing bill of exceptions was presented in due time, and
89 is hereby allowed, settled, and certified as correct, this the 16th day of August, 1886.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed August 16th, 1886. L. S. B. Sawyer, clerk, by F. D. Monckton, dep'y cl'k.

90 *Letter from W. H. Jenks, Acting Att'y-G'l, directing A. L. Rhodes to sue out writ of error.*

DEPARTMENT OF JUSTICE,
Washington, September 20, 1886.

A. L. RHODES, Esq.,
Counsellor at law, 430 California street, San Francisco, Cal.:

SIR: You will please sue out a writ of error in the case of S. F. Savings Union et al. v. John Irwin, U. S. circuit court for the district of California.

A writ of error being to be sued out by direction of this Department no bond will be necessary. (Vide § 1001, Rev. Stat.)

As to the cost of making out the transcript to accompany the writ of error, the authority of this letter will be sufficient to entitle the clerk of the said court to his proper allowances.

Very respectfully, your obedient servant,

W. A. JENKS,
Acting Attorney-General.

(Endorsed:) No. 3140. U. S. circuit court, 9th circuit. San Francisco Savings Union et al. v. John Irwin. Letter from Att'y-Gen'l. Filed September 27th, 1886. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

91 In the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

THE SAN FRANCISCO SAVINGS UNION ET AL.
vs.
JOHN IRWIN.
} No. 3140.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify that the foregoing ninety written pages, numbered from 1 to 90, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this 5th day
92 of October, A. D. 1886.

[SEAL.] L. S. B. SAWYER,
Clerk.

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States, of the ninth judicial circuit, in and for the northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you between John Irwin, plaintiff in error, and The San Francisco Savings Union, The Bank of California, and George A. Nourse, defendants in error, a manifest error hath happened, to the great damage of the said plantiff in error, as by his complaint appears, and being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27 day of September, in the year of our Lord one thousand eight hundred and eighty-six and of the Independence of the United States the one hundred and eleventh.

[SEAL.] L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the Northern District of California,
By F. D. MONCKTON,
Deputy Clerk.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

94 *The answer of the judges of the Circuit Court of the United States for the northern district of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Indorsed:) No. 3140. United States Supreme Court. John Irwin, pl'ff in error, vs. The San Francisco Savings Union et al., def'ts in error. Writ of error. Filed October 2d, 1886. L. S. B. Sawyer, clerk.

95 UNITED STATES OF AMERICA, *ss.:*

To the San Francisco Savings Union, the Bank of California, and George A. Nourse, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 11th day of October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America, of the ninth judicial circuit in and for the northern district of California, wherein John Irwin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States of America for the northern district of California, this 27th day of September, A. D. 1886, and of the Independence of the United States the one hundred and eleventh.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

96 (Indorsed:) No. 3140. In the Supreme Court of the United States. John Irwin, pl'ff in error, vs. The San Francisco Savings Union et al., def'ts in error. Citation: Service of a copy of the within citation is hereby acknowledged this third day of October, 1886. Geo. A. Nourse, att'y for def'ts in error. Filed October 4, 1886. L. S. B. Sawyer, clerk.

(Indorsement on cover:) No. 1158. John Irwin, plaintiff in error, vs. The San Francisco Savings Union, The Bank of California, and George A. Nourse. N. California, C. C. U. S. Filed October 15, 1886.

In the Supreme Court of the United States

OCTOBER TERM, 1886.

JOHN IRWIN, PLAINTIFF IN ERROR,
vs.
THE SAN FRANCISCO SAVINGS UNION *et al.*
No. 1158.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

JOHN IRWIN, PLAINTIFF IN ERROR,
vs.
THE SAN FRANCISCO SAVINGS UNION *et al.* } No. 1158.

Comes the Attorney-General of the United States and presents a letter from the Secretary of the Interior, showing the importance of this case and the necessity of an early decision therein, and he makes such letter a part of this motion, and moves the court to advance said cause on the docket and assign it for argument and submission at an early day.

A. H. GARLAND,
Attorney-General.

DEPARTMENT OF THE INTERIOR,
Washington, November 30, 1886.

To the honorable ATTORNEY-GENERAL:

SIR: I have the honor to return herewith the record in the case of *John Irwin, plaintiff in error*, v. *The San Francisco Savings Union et al.*, now pending in the Supreme Court of the United States, together with the report of the Commissioner of the General Land Office upon the customs and usages of the Land Office with reference to

the administration of the Swamp Land Act, called for by your letter of November 4, 1886, to whom the same was referred.

The Commissioner in his report states that there is nothing of record in the General Land Office to warrant a recommendation from that office to advance this case on the docket, it appearing to be a matter solely within the discretion of the Attorney-General.

Upon an examination of the opinion and judgment in this case it appears to have been held that the right of the State to all lands that were swamp and overflowed at the date of the act of September 20, 1850, is complete by virtue of the act, independent of Executive action, and that it is not made to depend on the listing of the lands to the State, or patent from the United States, whether such Executive action was applied for or not.

I am of the opinion that this is a question of sufficient general interest and importance to warrant a motion on the part of the Government to advance the case on the docket, and I so recommend.

It appears that the right and title to extensive improvements, costing the Government several millions of dollars, is also involved, which would seem to be an additional reason for asking the advancement of the case. This view, I presume, will be considered in the Department of Justice.

Respectfully,

L. Q. C. LAMAR,
Secretary.

In the Supreme Court of the United States

OCTOBER TERM, 1889.

JOHN IRWIN, PLAINTIFF IN ERROR,
vs.
THE SAN FRANCISCO SAVINGS UNION and others.
No. 181.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN IRWIN, PLAINTIFF IN ERROR,
vs.
THE SAN FRANCISCO SAVINGS UNION AND OTHERS. } No. 181.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

This is an action of ejectment, brought in the superior court of Solano County, Cal., and afterwards removed into the United States circuit court, to recover a large body of swamp and overflowed lands contiguous to the main-land of Mare Island, upon which island the United States has a navy-yard and has erected extensive buildings, etc.

The plaintiff in error, the defendant below, was the officer in command of the said navy-yard at the time the suit was brought and had no other interest in the controversy.

The case was tried without a jury, under a stipulation in writing (pp. 11, 12), and judgment rendered for the plaintiffs, to the effect that they were entitled to the possession of the lands in controversy.

This writ of error raises but one question.

The plaintiffs claimed title to the swamp and overflowed lands in question, under the State of California, and introduced in evidence a patent from the State to one John W. Pearson, from whom they derived title.

This evidence was objected to by the defendant on the ground—

> "That a patent issued by the State to any individual for swamp or overflowed lands does not convey title to the lands therein described, unless it be shown that the same lands have been patented by the United States to the State, or listed to the State by the Land Department of the United States. That it has not been shown by competent evidence that it has been determined by the proper authority of the Land Department of the United States that the lands described in the patent, or any part thereof, are swamp or overflowed lands within the meaning of the act of Congress approved September 28, 1850, commonly known as the Arkansas land act."

The objection was overruled and the patent read to the jury, whereupon the defendant excepted (p. 24).

The plaintiffs then introduced other evidence, parol and documentary, for the purpose of showing that the land sued for answered to the description of swamp and overflowed lands, and the defendant moved the court to strike out and exclude all said evidence, including the patent, but the court denied the motion, and thereupon the defendant excepted (pp. 25, 26).

The opinion of the eminent circuit justice (pp. 16–22) upon the questions raised by the bill of exceptions, appears to be sustained by the subsequent opinion of this court in Wrigbt *v.* Roseberry (121 U. S., 488).

The case is, therefore, submitted without further observation.

WM. A. MAURY,
Assistant Attorney-General.

Office Supreme Court
FILED
JAN 2[illegible] 1899
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

JOHN IRWIN,
Plaintiff in Error,

vs.

THE SAN FRANCISCO SAVINGS UNION *et als.*,
Defendants in Error.

GEO. A. NOURSE,
Counsel for Defendant in Error.

R. O. Polkinhorn, Printer, 632 and 634 D Street.

IN THE

Supreme Court of the United States.

JOHN IRWIN,
Plaintiff in Error,

vs.

THE SAN FRANCISCO SAVINGS UNION *et als.*,
Defendants in Error.

Nearly forty years since (Sept. 28, 1850), the United States "granted" to each State in the Union "the whole of those swamp and overflowed lands made unfit thereby for cultivation within their respective limits," then unsold. (9 Stat., 519).

California was then a State 19 days old; having been admitted to the Union Sept. 9, 1850.

The granting act (Sect. 2) made it the duty of the Secretary of the Interior, "as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor" of the State in which the lands so listed may be situaten, "and, at the request of said Governor, cause a patent to be issued to the State therefor."

At this date, there are some millions of acres in California alone, confessedly included in this grant, of which no lists have been made, and for which no patents to the State have been issued under this act.

How many millions of acres remain to be listed and patented in other States I have no means of knowing.

The matter has been neglected by one Secretary after another, of all political complexions, and the courts hold that *mandamus* will not lie to compel such listing and patenting. No method has been discovered to compel such action by a Secretary, who lies back in lordly disregard of the rights of the several States in this behalf, and of purchasers from the States.

R. R. Co. vs. *Smith*, 9 Wall., 95.

The whole power of this Government seems unequal to the task of overcoming the *vis inertiæ* of the Secretary of the Interior.

Meanwhile the State of California, claiming under decision after decision of this court, and of its own courts, that the granting act, constituted a grant *in presenti*, has sold and patented probably two million acres of the "swamp and overflowed land" within its limits, and the purchasers have gone into possession, and in many cases made very large and expensive improvements—leveeing, ditching, and cultivating. Some millions of dollars have been thus expended.

The question in the case at bar is, has the State of California—have its grantees—any title to any swamp and overflowed lands within its limits, which

the Secretary of the Interior has not yet listed or patented to the State?

This question has been so often and so uniformly answered in the affirmative by the supreme courts of the State, and of the Nation, that it seems to me not respectful to this court that the plaintiff in error should again present it for decision here.

He has kept us out of possession of our land for more than three years, to bring before this court by writ of error a question which this court has decided over, and over, and over again, and which is as thoroughly settled as that two and two make four.

The land in dispute is a tract of 7,500 acres, of triangular shape, whose southerly point touches Mare Island (owned by the United States), and which is bounded on the northeast by Napa River, on the southwest by San Pablo Bay, and on the north by other similar land from which it is separated only by a surveyor's line.

At every "spring-tide," twice a month, it is overflowed to the depth of two or three feet by the salt water, and its only growth consists of worthless salt grass and tules.

It was found by the court below to be "swamp and overflowed." Indeed that was not seriously contested.

The State of California patented it as "swamp and overflowed" land to John W. Pearson April 7th, 1874. The defendants in error (plaintiffs below) have succeeded to his title by sundry *mesne* conveyances, and hold it as tenants in common.

In the summer of 1883, they had opportunity to sell, and the intending purchaser went to look at the

tract *via* the Mare Island Navy Yard, and was there informed by the original defendant, "Captain John Irwin, Commandant of the Mare Island Navy Yard," that he—the said "Captain John Irwin, Commandant, &c., &c."—claimed the land to be the property of the United States, represented by him, the said "Captain John Irwin, Commandant, &c., &c., &c.;" and that if the said purchaser should go upon the land, he, the said "Captain John Irwin, Commandant, &c., &c.," would "put him off with a file of marines."

The plaintiffs, thinking it better to place their claim before the courts, than to "tell it to the marines," at once brought suit in a State court against Irwin, to recover possession of the land.

The suit was removed to the Circuit Court of the United States for California; was tried there, after long delay; was decided on all points in favor of the plaintiffs, and, on the 27th September, 1886, was brought to this court on writ of error.

Now, six years after suit brought, and three years and more after the writ of error is sued out, the plaintiff in error comes before your honors to ask a reversal of the judgment, which reversal can only be had by overruling a long series of decisions made by this court, and by the Supreme Courts of several States during a period of over thirty years.

The court below has found that plaintiffs own the land; that the United States has not acquired any title thereto by prescription, nor under the alleged Mexican grant claimed to have been made to Victor Castro. The possession of defendant is admitted by the pleadings.

There is no assignment of errors, and we can only look to the bill of exceptions for alleged error.

The only error claimed by the bill of exceptions to have occurred, consisted in the admission in evidence of the State patent to John W. Pearson (plaintifis' grantor), and in the admission of oral evidence to prove the character of the land as overflowed. The first claim is too manifestly absurd to require argument. As to the second, whatever ground there may have been originally for difference of opinion, it is no longer an open question in this court. Such evidence has, over and over again, been held by this court to be admissible for this purpose. Before the decision of this case in the court below, it had been so held in *R. R. Co.* vs. *Smith*, 9 Wall., 95, approved in *French* vs. *Fyan*, 93 U. S., 159, and it had been so held in a host of decisions made by the Supreme Courts of the State of California, and of other States cited in the great case hereafter referred to.

But since the issuance of the writ of error herein, the whole question has been exhaustively discussed in *Wright* vs. *Roseberry*, 121 U. S., 488, and the whole matter settled forever.

The masterly opinion in that case goes over the whole ground—cites and discusses the opinions of Attorneys General and Secretaries, as well as the decisions of courts on the question now at bar, in so thorough and complete a manner as to leave absolutely nothing more to be said.

The point raised in that case is precisely the same as that presented in the case at bar—can any land be proved to come within the swamp-land grant by oral

testimony, when not listed or patented to the State by the Secretary ?

This Court held, that the certificate of the Commissioner (Secretary) was not necessary to pass the title to the State, and sent the case back for a new trial, because the court below had so held.

This Court further held that "the grant of 1850 is one *in presenti*," and that when the Secretary of the Interior "has neglected or failed to make the identification" of the lands granted, "it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object." We rest our case upon the opinion and decision in "*Wright* vs. *Roseberry*," without further argument.

I am sure that the Attorney General will not claim that (especially since the decision in *Wright* vs. *Roseberry*) there is any ground for the contention of the attorneys employed by the Government to conduct defendant's case in the court below. It is the misfortune alike of the original plaintiffs and of the Government, that the defendant's case below was not managed by lawyers as capable and candid as those who now represent the plaintiff in error.

The only question left is, whether plaintiff in error should not be mulcted in damages equal at least to a fair counsel fee for defendants in error for suing out a writ of error on grounds so frivolous. We ask it, as mere justice.

GEO. A. NOURSE,
Counsel for Defendant in Error.